

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRA-S No.2406-SB of 2004 (O&M)

Date of decision: 10.10.2018

Suresh Kumar

....Appellant

Versus

State of Haryana

....Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Ms. Swati Batra, Advocate (*Amicus Curiae*)
for the appellant.

Mr. Ramesh Kumar Ambavta, AAG, Haryana.

ARVIND SINGH SANGWAN J.

Challenge in this appeal is to the judgment of conviction dated 05.12.2003 vide which the appellant was held guilty for offence punishable under Section 15(c) of the Narcotic Drug and Psychotropic Substances Act, 1985 (in short 'NDPS Act') along with the co-accused – Virender Kumar and the order dated 09.12.2003 vide which the appellant and his co-accused – Virender Kumar were sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1 lac and in default of payment of fine to further undergo rigorous imprisonment for a period of 02 years.

The present appeal was filed in the year 2004 and thereafter, the sentence of the appellant was suspended on 14.03.2007 considering the long custody of the appellant.

As per the Custody Certificate dated 09.10.2018 filed in

the Court today, the appellant has undergone 06 years, 02 months and 05 days of total sentence including the remissions till 20.03.2007 when he was released from judicial custody. It is stated by counsel for the State that the appellant was not found involved in any other case prior to registration of the present FIR and even subsequent thereto and thus, after releasing the appellant on bail in the year 2007, in the intervening period of 11 years, the appellant has not misused the concession of suspension of sentence.

At the very outset, it may be noticed that the co-accused of the appellant namely Virender Kumar had filed separate appeal i.e. Criminal Appeal No.2369-SB of 2003 and considering the fact that he has also undergone the substantive sentence, his appeal was heard on merits and the same was also allowed. The operative part of the judgment dated 25.08.2009 passed in Criminal Appeal No.2369-SB of 2003, reads as under:-

“This appeal is directed against judgment dated 5.12.2003 and order dated 9.12.2003 passed by the Additional Sessions Judge Fatehabad (hereinafter described as 'the trial Court') whereby the appellant along with his co-accused, Suresh Kumar has been convicted and sentenced under Section 15(c) of the Narcotic Drugs and Substances Act, 1985 (for short 'the Act'), to undergo rigorous imprisonment for ten years and to pay a fine of Rs.one lac and in default of payment of fine to undergo further rigorous imprisonment for two years.

The appellant, his co-accused were sent up to face trial by the Station House Officer, Police Station, Ratia for the offence punishable under Section 15 of the Act. The case of the prosecution, in brief, is that on 7.10.2000 when

Charan Singh, A.S.I. of Police Station, Ratia along with police party was present in the police station, he received a secret information that both the appellant and his co-accused were indulging in smuggling of poppy husk in a canter (Tata-407) bearing registration No.HR-39-1678 and used to transport the same to Punjab through Lalwas-Kalotha road and on that day also, they would bring the same and if a nakabandi was laid at Bus stand, Khairpur, they could be apprehended. On receipt of the information, Charan Singh, A.S.I. Tried to associate in the nakabandi a Gazetted Officer posted there, i.e., Tehsildar or Naib Tehsildar on telephone, but none of them was available. Thereafter, he flashed a wireless message and requested Avtar Singh, D.S.P., Tohana to reach at Bus Stand, Khairpur while explaining the facts to him. He reached the Bus Stand, Khairpur and laid a nakabandi. After sometime, the canter in question was seen coming from the side of village Lalwas. During this time, one Mehtab Singh resident of Kalotha also met the police party by chance and he was joined in the raiding party. The canter was signaled to stop and accordingly, its driver stopped the same at a distance of 15-20 paces from the police party. Both the appellant and his co-accused present in the canter were apprehended. The appellant was driving the canter, whereas his co-accused was sitting by his side in the front cabin. Suspecting that some contraband was in the canter, Charan Singh, A.S.I. Served a notice upon both the appellant and his co-accused to the effect that as he suspects some contraband in the canter and he wanted to search the same and if they so desire, the search can be conducted in the presence of a Gazetted Officer or a Magistrate. The contents of the notice were read over and explained to both of them, who signed the same in token of its acknowledgement in the presence of H.C. Niranjana

Singh and Mehtab Singh. In the meanwhile, Avtar Singh, D.S.P. also reached at the spot and he was apprised of the facts by Charan Singh, A.S.I. In their written replies which were signed by them and attested by the aforesaid two persons, i.e. H.C. Niranjana Singh and Mehtab Singh, the appellant and his co-accused desired that their search may be conducted in the presence of a Gazetted Officer. The replies were also attested by the D.S.P. on whose directions, the search of the canter was conducted after removing the tarpaulin. Forty bags containing poppy husk concealed in a special chamber made for that purpose were recovered from the canter. They were weighed and each of them was found containing 10 Kgs. of poppy husk. Samples of 100 grams were separated from each of the bags. The samples and the bags were separately sealed with the seals of 'CS' and 'AS'. The seal 'CS', after use, was handed over to H.C. Niranjana Singh, whereas the seal 'AS' was retained by the D.S.P. The sealed samples and the bags were taken into possession along with the canter and its registration certificate & tarpaulin vide separate recovery memos which were attested by the witnesses and Avtar Singh, D.S.P. An intimation was sent to the Police Station through Constable Ram Sarup for registration of a case, on the basis of which formal F.I.R. was recorded. A site plan was also prepared of place of recovery. The investigating officer formally arrested the appellant and his co-accused and recorded the statements of the witnesses. The case property and the appellant and his co-accused were produced before the Station House Officer, who, after verification, also put his seal on the samples and the bags. The investigating officer was directed to deposit the case property with the M.H.C., and the appellant and his co-accused were put in the lock-up.

The samples were sent for chemical analysis and

after receipt of the necessary report and completion of investigation, a report under Section 173 of the Cr.P.C. was prepared and submitted to the Illaqa Magistrate, who committed the case to the trial Court.

The appellant and his co-accused were charge sheeted for an offence under Section 15 of the Act to which they pleaded not guilty and claimed trial.

In order to establish its case, the prosecution examined as many as many as seven witnesses and tendered the report of the Forensic Sciences Laboratory in evidence. Mehtab Singh-witness was given up by the Public Prosecutor.

In their statements recorded under Section 313 of the Cr.P.C., the appellant and his co-accused denied the allegations against them and pleaded innocence. In defence, Mehtab Singh was examined as DW2. The appellant and his co-accused also produced DW1-Hardev Singh and DW3-Shamsher Singh Malik, Finger Prints & Handwriting Expert, Hisar and tendered documents exhibits D1 to D3.

After appraisal of the entire evidence on record, the trial Court convicted and sentenced the appellant and his co-accused in the manner indicated hereinabove.

Aggrieved by his conviction and sentence, the appellant has filed the instant appeal.

Learned counsel for the appellant has contended that the independent witness, namely, Mehtab Singh, was not examined by the prosecution and this casts a serious aspersion on its case. He further contended that the case was set up on the basis of a secret information, but there is no material on record that after receipt of such information, the same was ever reduced into writing and the higher authorities were informed about it. Besides this, it is in evidence that the information regarding raid was

sent to Avtar Singh, D.S.P. by wireless after the investigating officer failed to contact Tehsildar and Naib Tehsildar, but PW6-H.C. Niranjana Singh has stated that the D.S.P. had reached the spot after the search had been carried out. Learned counsel for the appellant has submitted that only one sample from each of the bags was taken, whereas the requirement of the law is that at least two samples should have been drawn. He further submitted that, according to the evidence on record, the ruqa was prepared on the spot on the basis of which the F.I.R. was recorded subsequently in the police station after the receipt thereof. But, it has also come on record that the ruqa and the F.I.R. are in the same hand implying thereby that the prosecution story is false and this fact only suggests that the recovery and the entire incident is stage-managed. For this, he referred to the testimony of DW3-Shamsher Singh Malik, Finger Prints and Handwriting Expert, Hisar, who, after examination of the writings of the ruqa and F.I.R., had opined that the same are in one hand. Lastly, learned counsel for the appellant argued that there is serious discrepancy in the statements of the official witnesses because PW6-H.C. Niranjana Singh has stated that only twenty bags were recovered, whereas PW3-Avtar Singh, D.S.P. and PW7-Charan Singh, A.S.I. have deposed that forty bags were recovered.

On the basis of the above contentions submissions/arguments, learned counsel for the appellant contended that the impugned judgment is liable to be set aside. He placed reliance on the judgments of this Court in Chhabil Das Versus State of Haryana, 1998) R.C.R. (Criminal) 133 (P&H); Mangal Singh Versus Punjab State, 1999(3) R.C.R. (Criminal) 373 (P&H); State of Punjab Versus Jagit Singh, 2002(4) R.C.R. (Criminal) 442 (P&H) Hawa Singh Versus State of Haryana, 2005 (4)

R.C.R. (Criminal) 292 (P&H) and Gurcharan Singh Versus State of Punjab, 2005(4) R.C.R. (Criminal) 681 (P&H).

To the contrary, learned counsel for respondent-State contended that there is ample evidence on record to sustain the conviction and sentence of the appellant and that the canter which was seized was having a concealed chamber, especially made for the purpose and, therefore, the appellant cannot be considered to be innocent by any stretch of imagination.

I have thoughtfully considered the rival contentions and have perused the impugned judgment, as also the record.

There appears to be serious infirmity in the case of the prosecution. The whole case set up by it is that a secret information was received on the basis of which the police acted and apprehended the canter in which the contraband was discovered. It is also the case of the prosecution that attempts were made to associate a gazetted officer, but not finding the Tehsildar and Naib Tehsildar, a wireless message was flashed asking the D.S.P. to come present at the spot. The secret information so received was required to be reduced into writing, but there is no evidence to suggest that such an exercise was undertaken by the investigating officer, who had received the same. It is the further case of the prosecution that the investigating officer had sent a wireless message to the D.S.P., but there is no material on record indicating this fact. That apart, it has been established by way of evidence on record that the F.I.R. and the ruqa are in one hand. This seems highly improbable. If the ruqa was recorded by the A.S.I. on 7.10.2000 which purportedly he did after conducting the search, then it is not conceivable how the F.I.R. which was registered on the basis of such

ruqa, was recorded in the same hand. DW3, the handwriting expert, who was produced in defence, has categorically opined that he had compared the disputed writing in ruqa, Exhibit PI with the writing in F.I.R., Exhibit P2, and found that both the writings were identical and were written by one person, but not written by the A.S.I., and M.H.C. of Police Station. This casts a serious dent in the prosecution case. If the ruqa was not written by the A.S.I., and the F.I.R. by the M.H.C., then both documents were written by some one else implying thereby that the prosecution story suffers from serious blemish and falsifies the whole story of the receipt of secret information and the consequent search was merely fictional.

That apart, there are reasons which strengthen the suspicion of the Court as PW6-H.C. Niranjan Singh, who was a member of the raiding party, has stated that there were twenty bags which were recovered, whereas the entire prosecution story is that there were forty bags which were seized. In this cross-examination, PW6 has denied that he had ever stated before the investigating officer that forty bags which contained 10 Kgs. of poppy husk each, were taken into possession. This witness, in his examination-in-chief was more categorical that there were twenty bags. He further stated that the search had already been conducted before the D.S.P. had arrived at the spot. This is a serious contradiction as whole case of the prosecution that the D.S.P. was present at the time of search. The prosecution has set up the case that the appellant and his co-accused had consented to their search being conducted in the presence of a gazetted officer, but if the testimony of PW6-H.C. Niranjan Singh is believed, then the search was over when the DSP had come. There is, thus, violation of Section 50 of the Act.

In State of Punjab Versus Baldev Singh, 1993(3)

R.C.R. (Crl.) 533 (S.C.), their Lordships of the Supreme Court observed in paragraphs 24 and 25 of the judgment as under:-

"24. To be searched before a Gazetted Officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the concerned person having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It appears to have been incorporated in the Act keeping in view the severity of the punishment. The rationale behind the provision is even otherwise manifest. The search before a Gazetted Officer or a Magistrate would impart much more authenticity and creditworthiness to the search and seizure proceeding. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the person, on prior information, to effect the search, of not informing the concerned person of the existence of his right to have his searched conducted before a Gazetted Officer or a Magistrate, so as to enable him to avail of that right. It is, however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such information is communicated to the concerned person orally and as far as possible in the presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer had conveyed the information to the concerned person of his right of being searched in the presence of the Magistrate or a Gazetted Officer, at the time of the intended search. Courts have to be satisfied at the

trial of the case about due compliance with the requirements provided in Section 50. No presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the Court, that the requirements of section 50 were duly complied with.

*25. The safeguard or protection to be searched in presence of a Gazetted Officer or a Magistrate has been incorporated in section 50 to ensure that persons are only searched with a good cause and also with a view to maintain veracity of evidence derived from such search. We have already noticed that severe punishments have been provided under the Act for mere possession of illicit Drugs and Narcotic Substances. Personal search, more particularly for offences under the NDPS Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguards provided in Section 50 of the Act are observed scrupulously. The duty to inform the suspect of his right to be searched in presence of a Gazetted Officer or a Magistrate is a necessary sequence for enabling the concerned person to exercise that right under Section 50 because after **Maneka Gandhi v. Union of India, 1978 (1) SCC 248**, it is no longer permissible to contend that the right to personal liberty can be curtailed even temporarily, by a procedure which is not "responsible, (reasonable?) fair and just" and when a statute itself provides for a 'just procedure', it must be honoured. Conducting a search under Section 50, without intimating to the suspect that he has a right to be searched before a Gazetted Officer or a Magistrate, would be violative*

of the 'reasonable, fair and just procedure' and the safeguards contained in Section 50 would be rendered illusory, otiose and meaningless. Procedure based on systematic and unconscionable violation of law by the officials responsible for the enforcement of law, cannot be considered to be fair, just or reasonable procedure. We are not persuaded to agree that reading into Section 50, the existence of a duty on the part of the empowered officer, to intimate to the suspect, about the existence of his right to be searched in presence of a Gazetted Officer or a Magistrate, if he so requires, would place any premium on ignorance of law. The argument loses sight of a clear distinction between ignorance of the law and ignorance of the right to a reasonable, fair and just procedure.”

There is yet another infirmity which is apparent from the perusal of the record, i.e., only one sample was taken from each of the recovered bags, whereas the law mandates that at least two samples be taken out of the recovered contraband. There is also no explanation as to why independent witness-Mehtab Singh was given up by the prosecution. He subsequently appeared as a witness for defence and denied the case against the appellant and his co-accused.

When all the aforesaid factors are considered in their totality, then the prosecution case does not seem to be well founded.

For the reasons and discussions given hereinabove, this appeal is allowed and resultantly, the impugned judgment is set aside and the appellant – Virender Kumar is acquitted of the charge against him.”

Counsel for the State has very fairly conceded that no

Special Leave Petition was filed before the Hon'ble Supreme Court

challenging the aforesaid judgment dated 25.08.2009 vide which the co-accused of the appellant was acquitted and the same has attained finality.

Counsel for the appellant has argued that the case of the appellant is on identical footing and as per the version in the FIR, it was the co-accused – Virender Kumar, who was driving the canter whereas the appellant – Suresh Kumar was sitting in the cabin and, therefore, the entire evidence against the appellant as well as the co-accused – Virender Kumar is same and this Court has already acquitted Virender Kumar and therefore, the appellant is also entitled to be acquitted in view of the aforesaid judgment.

Counsel for the State has not disputed the aforesaid facts.

Accordingly, in view of the above, considering the fact that the appellant has already undergone 06 years, 02 months and 05 days of total sentence out of 10 years rigorous imprisonment awarded by the trial Court and his co-accused – Virender Kumar also stands acquitted vide judgment dated 25.08.2009 passed in Criminal Appeal No.2369-SB of 2003, the present appeal is allowed, the judgment of conviction dated 05.12.2003 and order of sentence dated 09.12.2003 are set-aside.

(ARVIND SINGH SANGWAN)
JUDGE

10.10.2018
yakub

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No